

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1060

B p/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 74-1060

SHERWIN S. MINKES,

Plaintiff-Appellant,

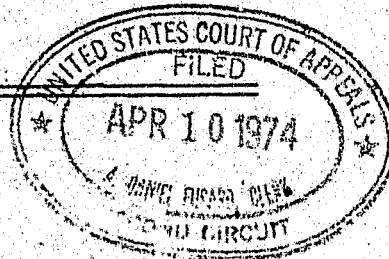
-against-

XEROX CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE



Of Counsel:

ROLON W. REED
CARL C. MONK

SIMPSON THACHER & BARTLETT
One Battery Park Plaza
New York, N. Y. 10004

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BRIEF FOR APPELLEE

STATEMENT OF ISSUE PRESENTED

The issue presented is:

Whether the district court's order dismissing
this action on the ground that it fails to state a claim for
relief which is not barred by the statute of limitations
was erroneous.

STATEMENT OF THE CASE

This is an appeal from a December 12, 1973 order of Judge Morris E. Lasker (A 7)¹ granting appellee Xerox Corporation's motion for an order dismissing the complaint on the ground that it fails to state a claim for relief which is not barred by the statute of limitations.

The pro se complaint herein was filed on April 23, 1973 and served on Xerox Corporation on May , 1973. In its answer, served and filed on May 22, 1973, Xerox Corporation asserted the statute of limitations as its third defense.

Plaintiff-appellant claims he is suing "because of threats and knifing in lower back portion of my brain" (A 1) occurring on December 17, 1969. He also alleges that he suffered another "knifing in the upper back left portion of my brain" (A 2) on December 17, 1969 and that he was "further attacked" (A 2) for a third time on January 16, 1970 "with a sharp instrument entering the lower back portion of my brain" (A 2).

ARGUMENT

THE MOTION FOR DISMISSAL OF THE COMPLAINT
WAS PROPERLY GRANTED BECAUSE THE ACTION
FAILED TO STATE A CLAIM FOR RELIEF NOT
BARRED BY THE STATUTE OF LIMITATIONS.

Although the complaint did not contain any statement

¹ Citations for pages in the Appendix are abbreviated (A).

of the grounds upon which jurisdiction depended, the only possible basis for any such jurisdiction was diversity of citizenship. Since all acts complained of were said to have occurred in the State of New York, timeliness of this action depends on New York law. See, e.g., Guaranty Trust Co. v. York, 326 U.S. 99 (1945), Gleason v. United States, 458 F.2d 171 (3rd Cir. 1972).

Clearly the allegations in the complaint are of assault and battery, and they are barred by the New York statute of limitations because they were not brought within one year of their alleged occurrence. New York Civil Practice Law and Rules §215.

Even if the acts alleged in the complaint could fairly be characterized as unintentional negligently inflicted personal injuries, they are also barred by the New York statute of limitations because they were not brought within three years of their alleged occurrence. New York Civil Practice Law and Rules §214.

For reasons unknown to Xerox Corporation, the basis of this action was described on its docket sheet (D.C. Form No. 106 Rev.) as "Civil Rights". Even if this action may properly be considered one for violation of civil rights, it is still barred by the applicable statute of

limitations. An action under 42 USC §1983 must be commenced within the time prescribed by the law of the state in which the district court is located. See, e.g., Romer v. Leary, 425 F.2d 186(2d Cir. 1970). Section 214 of the New York Civil Practice Law and Rules requires an action to recover on a liability imposed by statute to be commenced within three years, unless such statute otherwise provides. Section 214 thus also requires actions under the New York Civil Rights Law to be brought within three years. The New York Human Rights Law contains a one year statute of limitations.

Thus, under any theory of liability, the order dismissing this action should be affirmed.

As Judge Lasker noted in his order (A 9), Mr. Minkes filed with the Court, on October 9, 1973, a document purporting to be an amended complaint (A 19). Since this paper was filed six months after defendant-appellee's answer, it cannot be considered an amendment to the complaint since leave of court was not obtained for its service. Rule 15, Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, it is evident that the district court's order dismissing this complaint was not erroneous. Accordingly, the order of the district court should be affirmed.

Dated: April 3, 1974

Respectfully submitted,

SIMPSON THACHER & BARTLETT
Office and P. O. Address
One Battery Park Plaza
New York, N. Y. 10004

Of Counsel:

ROLON W. REED
CARL C. MONK

Attorneys for Defendant-Appellee
Xerox Corporation

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

MARIE MULHALL , being duly
sworn, deposes and says:

I am over the age of eighteen (18) years and
am not a party to this action.

On the 8th day of April , 1974, I served
a copy of the annexed paper upon

Sherwin S. Minkes, Pro Se
P.O. Box 4033
Kendall, Florida 33156

by depositing a true copy of the same in a properly
addressed postpaid wrapper in a regularly maintained
official depository under the exclusive care and custody
of the United States Post Office Department located in
the City, County and State of New York.

Marie Mulhall

Sworn to before me this
8th day of April , 1974.

Dard Kiewra
DARD KIEWRA
Notary Public, State of New York
No. 41-4508134
Qualified in Queens County
Commission Expires March 30, 1975

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